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No. 91-112

In the Supreme Court of the United States

OCTOBER TERM, 1991

BUDDY CRAMER, PETITIONER

v.

SAMUEL K. SKINNER, SECRETARY
OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48 (the Love Field Amendment), places certain restrictions on interstate air service involving Love Field Airport in Dallas, Texas. The question presented is whether the court of appeals erred in stating that the Amendment did not violate petitioner's constitutional rights to interstate travel and free speech or the Port Preference Clause, Art. I, § 9, Cl. 6.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. la-35a, is reported at 931 F.2d 1020. The opinion of the district court, Pet. App. 62a-68a, is unreported.

JURISDICTION

The decision of the court of appeals was entered on May 9, 1991. The petition for a writ of certiorari was filed on July 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48, known as the Love Field Amendment, places certain restrictions on interstate air travel involving Love Field, located near Dallas, Texas. Those restrictions, enacted following the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, were intended to provide "a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years," involving competition between the cities of Dallas and Fort Worth, by restricting interstate operations at Love Field and encouraging interstate travel at the Dallas-Fort Worth International Airport. See H.R. Conf. Rep. No. 716, 96th Cong., lst Sess. 24 (1979).

The Love Field Amendment prohibits airlines from offering single ticket interstate service to or from Love Field, except between Love Field and the four States contiguous to Texas (Louisiana, Arkansas, Oklahoma, and New Mexico—the Love Field service area). Pub. L. No. 96-192, § 29, 94 Stat. 48. Passengers may travel between Love Field and points outside the Love Field service area by taking a second flight. Such travelers must buy a separate ticket for each leg of their journey, and cannot check their baggage through for the entire trip. Love Field Amendment Proceeding, DOT Order 85-12-81 (Dec. 31, 1985), petition for review denied, *Continental Air Lines, Inc.* v. *Department of Transp.*, 843 F.2d 1444 (D.C. Cir. 1988). Passengers may also obtain unrestricted interstate airline services at the Dallas-Fort Worth International Airport, located 18 miles from the center of Dallas and only 12 miles from Love Field. Pet. App. 4a. The Love Field Amendment does not restrict a limited monthly number of charter air flights to or from

Love Field, flights provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less, or persons providing interstate service from Love Field on November 1, 1979. Pub. L. No. 96-192, § 29 (a) and (c), 94 Stat. 48.

The Love Field Amendment also prohibits airlines and their agents from advertising or volunteering information on interstate services offered between Love Field and points outside the service area. Pub. L. No. 96-192, § 29(b), 94 Stat. 48; Love Field Amendment Proceeding, DOT Order 85-12-81 (Dec. 31, 1985). Airlines and their agents may, however, provide such information on a passenger's request.

2. Petitioner Buddy Cramer is an occasional airline passenger residing in Texas. On April 21, 1989, he filed a complaint in the United States District Court for the Northern District of Texas, seeking declaratory and equitable relief against those responsible for enforcing the Love Field Amendment.* Pet. App. 5a. As amended, his complaint asserts that the Love Field Amendment unconstitutionally burdens his right to travel interstate and violates the Port Preference Clause and the First Amendment. Pet. App. 64a.

The government moved to dismiss the complaint for lack of standing or, in the alternative, for summary judgment. Petitioner filed a cross-motion for summary judgment. The district court concluded that petitioner "has no standing to challenge the constitutionality of the Love Field Amendment." Pet.

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* The complaint named as defendants Samuel K. Skinner, as Secretary of the Department of Transportation, the Department of Transportation, John V. Coleman, as Director of the Department's Office of Aviation Analysis, the Office of Aviation Analysis, and the United States of America. Pet. App. 5a.

App. 67a. Accordingly, it granted the government's motion and denied petitioner's. *Id.* at 67a-68a.

3. On petitioner's appeal, the court of appeals vacated the district court's judgment and remanded the case to the district court. The court of appeals "conclude[d] that the district court erred by dismissing [petitioner's] suit for lack of standing, but properly denied [petitioner's] cross-motion for summary judgment." Pet. App. 35a. In reaching the latter conclusion, the court rejected each of petitioner's constitutional objections on the merits. *Id.* at 20a-34a. Although the government briefed the merits of its motion for summary judgment, the court of appeals determined that it could not rule on that motion: "[W]e cannot order judgment on the merits for the Government because the Government did not cross-appeal from the district court's jurisdictional dismissal. *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924) (party who does not cross-appeal may not seek to enlarge his own rights or lessen those of his adversary)." Pet. App. 35a (citation omitted). Accordingly, the court of appeals vacated the district court's judgment and remanded the case to the district court with instructions to reconsider the government's motion for summary judgment and for further proceedings consistent with its opinion. *Ibid.*

ARGUMENT

1. The court of appeals' decision to remand the case to the district court suggests that petitioner's appeal of the merits of his claims is premature.

The court of appeals held that it lacked power to order summary judgment in the government's favor because the government "did not cross-appeal from the district court's jurisdictional dismissal," and the

award of summary judgment would enlarge its rights. Pet. App. 35a. Although petitioner did appeal the district court's denial of his cross-motion for summary judgment, *id.* at 20a, the court of appeals had no jurisdiction to review that decision because denials of summary judgment motions are not appealable. See *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 24-25 (1966); cf. *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (denial of class certification not appealable).

Although the court of appeals should not have gone on to review the district court's denial of petitioner's cross-motion for summary judgment (after it decided that petitioner had standing to pursue his constitutional claims), the court's mistake does not appear to have infected its judgment. The court correctly vacated the district court's "jurisdictional dismissal," and remanded the case to that court for consideration of the government's motion for summary judgment, Pet. App. 35a, just as it should have done if it had decided only that petitioner had standing. In the peculiar, interlocutory posture of this case, the Court should deny the petition for a writ of certiorari. If the district court awards summary judgment to the government, petitioner can perfect an appeal from a final decision under 28 U.S.C. 1291. If the district court refuses to rule summarily, and the case does not settle, the court can conduct a trial after which the loser can appeal on the basis of a full evidentiary record.

2. In any event, petitioner's three constitutional objections to the Love Field Amendment lack merit, and the court of appeals' dicta to that effect do not conflict with any decision of this Court or of any court of appeals.

a. Petitioner contends that the Love Field Amendment unconstitutionally infringes on his right to interstate travel. Pet. 10-14. Petitioner argues (Pet. 13) that the Love Field Amendment infringes on the right of interstate travel by "classify[ing]" persons as Love Field passengers or non-Love Field passengers and prohibiting the former class from boarding certain interstate flights, citing *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969).

This Court's decision in *Shapiro*, however, concerned a much more onerous burden on interstate travel than that imposed by the Love Field Amendment. *Shapiro* involved statutory provisions requiring a one-year waiting period for new State residents seeking welfare assistance. In contrast, the Love Field Amendment restricts interstate travel at one Texas airport but allows unrestricted travel to and from an airport a mere 12 miles away. Pet. App. 4a. Petitioner's argument "reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel." *City of Houston* v. *Federal Aviation Admin.*, 679 F.2d 1184, 1198 (5th Cir. 1982).

b. Petitioner also raises a facial challenge (Pet. 17-22) to the Love Field Amendment on the ground that the provision prohibiting "offers" by airlines and travel agents regarding interstate travel between Love Field and points outside the service area restricts speech in violation of the First Amendment. The court of appeals correctly concluded (Pet. App. 30a-31a) that because the speech at issue "propose[s] a commercial transaction," *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), concerns a lawful activity, and is not misleading or fraudulent, it enjoys the limited First Amendment protection accorded commercial speech. See *Board of Trustees* v. *Fox*, 492 U.S. 469, 474-

475 (1989); *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 340 (1986).

Petitioner responds (Pet. 15-17) that restrictions on the speech he wants to hear must survive heightened scrutiny because it involves his right to interstate travel. But this Court's previous decisions have accorded such scrutiny only where the underlying conduct "could not have been prohibited by the State." *Posadas*, 478 U.S. at 345. Here, petitioner concedes that Congress could have "limit[ed] the number of operations," Pet. 22, or even closed Love Field altogether. Because petitioner's theory would extend heightened scrutiny to speech tangentially related to a claimed constitutional right, it would erase the distinction between commercial and fully protected speech and ignore this Court's insistence on maintaining the distinct treatment accorded the two. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562-563 n.5 (1980); see, *e.g.*, *Board of Trustees*, 492 U.S. at 474-475.

Commercial speech may be restricted "if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest." *Posadas*, 478 U.S. at 340. Congress plainly has a substantial interest in resolving a regional dispute and thereby improving airline service for the Dallas-Fort Worth area. In *Central Hudson*, this Court held that a State's concern with fair and efficient electricity rates was a "clear and substantial governmental interest." 447 U.S. at 569. In *Central Hudson*, 447 U.S. at 568, and *Posadas*, 478 U.S. at 341, the government's interest in reducing demand—for electricity and for casino gambling by local residents, respectively—was held to be substantial. In this case, the government's interest in reduc-

ing demand for air travel at Love Field in order to promote the use of Dallas-Fort Worth Airport is similarly substantial.

Moreover, the restrictions at issue here directly advance the government's interest: the prohibition on advertising interstate service between Love Field and points beyond the service area may reasonably be expected to reduce the use of Love Field for such flights, and concomitantly increase the use of the Dallas-Fort Worth International Airport. See *Posadas*, 478 U.S. at 341-342; *Central Hudson*, 447 U.S. at 569.

Furthermore, a reasonable fit exists between the government's interest and the challenged restrictions. See *Board of Trustees*, 492 U.S. at 480. As the court of appeals observed, "[w]ithout the ban on advertising, more intrusive restrictions might be necessary to carry out Congress' decision to keep service at Love Field from undermining the agreement between Dallas and Fort Worth." Pet. App. 34a. Interested travelers may still ask any airline or travel agent for information regarding the implicated service. The fact that Congress might have chosen in the alternative to encourage or subsidize advertising designed to encourage use of the Dallas-Fort Worth International Airport does not impeach its reasonable judgment to prohibit certain Love Field advertising instead. See *Board of Trustees*, 492 U.S. at 479; *Posadas*, 478 U.S. at 344.

c. Finally, petitioner asserts (Pet. 22-29) that the Love Field Amendment violates the Port Preference Clause, which provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another." Art. I, § 9, Cl. 6. Petitioner argues that the Love Field Amendment

discriminates against ports in those States not within the Love Field service area.

The Port Preference Clause forbids preferences *between States* in respect of their ports or the entry or clearance of vessels, but "does not forbid such discrimination as between ports." *Alabama Great S. R.R.* v. *United States*, 340 U.S. 216, 229 (1951) (quoting *Louisiana Public Service Comm'n* v. *Texas & N.O.R.R.*, 284 U.S. 125, 131 (1931)). Congress may constitutionally act to benefit particular ports even if ports in the same or neighboring States are incidentally disadvantaged. *Ibid.* Congress has in this case acted to benefit the Dallas-Fort Worth International Airport, not to discriminate against States lying outside the Love Field service area. To the extent that the States abutting Texas are incidentally benefited by the Love Field Amendment, it is merely the "result of geography," *ibid.*, not the result of an unconstitutional congressional preference for the ports of those States in the Love Field service area. As the court of appeals noted (Pet. App. 28a n.14), petitioner has not demonstrated that Congress deliberately discriminated against the other 45 States by requiring that single ticket travel to or from them employ the Dallas-Fort Worth International Airport instead of Love Field.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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